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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JA-RU,

Petitioner,

—against—

CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether 15 U.S.C. § 5001, The Federal Imitation Toy Gun Law and the implementing regulations promulgated thereunder by the U.S. Department of Commerce at 15 C.F.R., § 1150 et seq. (collectively, the "Federal Toy Gun Law") preempt the enforcement of New York City Administrative Code Section 10-131(g) ("the Code")?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of *certiorari* to review the judgment entered by the Court of Appeals of New York in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals of New York ("Court of Appeals") is reported at 88 N.Y.2d 163, 66 N.E.2d 537 (1996) (affirming the Order of the N.Y. Supreme Court, Appellate Division, First Department ("Appellate Division")) and is reprinted in the Appendix ("APP.") to this petition at 1a-9a. The Order of the Appellate Division granting petitioner's Motion for Leave to Appeal to the Court of Appeals

is reprinted in the Appendix at 10a-11a. The Decision and Order of the Appellate Division entered March 14, 1995, with two Justices dissenting on questions of law in favor of the petitioner is reprinted in the Appendix 12a-19a. The Order and Decision of the Supreme Court, New York County, IAS Part 21 ("N.Y. Supreme Court") (granting preliminary injunction) was issued on April 12, 1994 and entered on/or about April 15, 1994 and is reprinted in the Appendix at 20a-26a. (Collectively referred to as the "N.Y. Courts").

JURISDICTION

The Court of Appeals filed its decision and order on May 7, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

STATUTES AND REGULATIONS INVOLVED

1. *THE FEDERAL STATUTE*

15 U.S.C. § 5001 entitled "Penalties for Entering Into Commerce of Imitation Firearms enacted in 1988 by Congress" reads in relevant part as follows:

(a) *ACTS PROHIBITED*

It shall be unlawful for any person to manufacture, enter into commerce, ship, transport or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce, as provided in subsection (b).

(b) *DISTINCTIVE MARKING FOR TOYS, LOOK-ALIKES, AND IMITATION FIREARMS, EXCEPTION, WAIVER, ADJUSTMENTS AND CHANGES*

(1) Except as provided in paragraph (2) or (3), each toy; look-alike, or imitation firearm shall have as an

integral part, permanently affixed, a blaze orange plug asserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm.

(2) The Secretary of Commerce may provide for an alternate marking or devise for any toy, look-alike, or imitation firearm not capable of being marked as provided in paragraph (1) and may waive the requirement of any such marking or device for any toy, look-alike or imitation firearm that will only be used in the theatrical, movie or television industry.

(3) The Secretary is authorized to make adjustments and changes in the marking system provided for by this section, after consulting with interested persons.

(c) *LOOK-ALIKE FIREARM DEFINED*

For the purpose of this section, the term "look-alike firearm" means any imitation of any original firearm which was manufactured, designed and produced since 1898, including and limited to toy guns, water guns, replica non-guns, and air-soft guns firing non-metallic projectiles. Such term does not include any look-alike, non-firing, collector replica of an antique firearm developed prior to 1898, or traditional B-B, paint ball or pellet-firing air guns that expel a projectile through the force of air pressure.

(g) *PREEMPTION OF STATE OR LOCAL LAWS OR ORDINANCES, EXCEPTIONS*

The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for marking or identification inconsistent with provisions of this section provided that no state shall

(i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or

(ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure." (See App. 27a-29a).

2. *THE COMMERCE DEPARTMENT REGULATIONS*

Federal regulations under 15 C.F.R. Section 1150.1-1150.5 were then promulgated by the United States Department of Commerce putting into effect the above statute and providing an extensive alternate scheme of color markings for toy guns. (See App. 30a-56a).

3. *THE NEW YORK CITY ADMINISTRATIVE CODE*

New York City Administrative Code Section 10-131(g) (the "Code") enacted into law in 1955 provides:

"It shall be unlawful for any person to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or aluminum, and further provided that the barrel of said toy or imitation pistol or revolver shall be closed with the same material of which the toy or imitation pistol or revolver is made for a distance of not less than one-half inch from the front end of said barrel. However, the possession or display of such instrument by a manufacturer or dealer, shall not be a violation of this section if sale is accompanied by delivery to a point without the city, and possession for such purpose by a manufacturer or dealer shall not be unlaw-

ful. Every such toy or imitation pistol or revolver hereinafter manufactured, distributed, transported or sold shall have legibly stamped thereon, the name of the manufacturer or some trade name, mark or brand by which the manufacturer can be readily identified." (See App. 56a-57a).

PRELIMINARY STATEMENT

This Federal preemption case merits this Court's review because it provides this Court with the opportunity to consider the preemptive effect of the express preemption clauses in the Federal Toy Gun Law. This is a case of first impression for this Court in that this Federal law, 15 U.S.C. § 5001 and the supplementary regulations thereunder, 15 C.F.R. Section 1150.1-1150.5, have never been reviewed by this Court.

The Court of Appeals' decision is inapposite to the Court's ruling in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608 (1992) and its recent rulings in *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995) and *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2239 (1996). The Federal Toy Gun Law expressly preempts the Code and the N.Y. Courts have inappropriately relied on cases dealing with implicit not express preemption, (specifically, *Florida Lime and Avocado Growers, Inc. et al. v. Paul*, 374 U.S. 858, 83 S.Ct. 1210 (1963)) or have misconstrued the scope and extent of Federal preemption provided by Congress in the Federal Toy Gun Law.

This case will assist significantly in establishing under what circumstances a Federal statute and its implementing regulations, containing an express preemption provision and comprehensive regulatory scheme, will supersede a state or local law and to what extent preemption should be maintained in furtherance of the Supremacy Clause of the United States Constitution (U.S. Const., Art VI, cl. 2) (*Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

More specifically *certiorari* should be granted in order for the express preemptive provision of the Federal Toy Gun Law to be found, as intended, to prohibit state laws or local ordinances which provide for coloration and markings of toy guns which are different or inconsistent from the Federal Toy Gun Law.

In determining whether the Code provisions are "inconsistent" with the Federal Toy Gun Law provisions, the Court of Appeals erroneously interpreted the word "inconsistent" to mean "impossible to comply with both" the Federal Toy Gun Law and the Code. Instead the Court of Appeals should have accorded the term its plain meaning as in "different or incompatible" based on the legislative history, the express preemptive provision contained in 15 U.S.C. § 5001(g), and the extensive regulations promulgated by the United States Secretary of Commerce which sets forth marking and coloration requirements (App. 30a-55a). The Code should also be preempted by the Federal Toy Gun Law since "compliance with both Federal and State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Court of Appeals ignored the broad implications of such an analysis. This case will also aid significantly in resolving how courts determine whether a Federal statute with an express preemption clause preempts a state or local law and further clarify the effect of such a provision on the doctrine of implied preemption.

STATEMENT OF THE CASE

1. The Toy Gun Is In Full Compliance with the Federal Toy Gun Law

Petitioner, JA-RU, Inc. ("JA-RU") is a national manufacturer and distributor of toy guns. Its products include an item which the City of New York ("the City") alleges violates the

Code in that the item (1) contains the color black which is prohibited by the Code and (2) is not stamped bearing the name of the manufacturer as required by the Code. JA-RU, however, contends that their toy gun fully complies with the Federal Toy Gun Law requirements in that it contains a blaze orange plug recessed no more than 6 millimeters from the muzzle end of the barrel and inappropriately colored. The City does not dispute the fact that JA-RU's products are manufactured in accordance with the requirements of the Federal Toy Gun Law. Indeed, the City was unaware of the Federal regulatory scheme when it commenced the action.

The Federal Toy Gun Law expressly allows that which the City prohibits, namely, the sale of black, blue, silver or aluminum guns, provided that they contain the requisite blaze orange plug or blaze orange band markings prescribed by the regulations. What could be more inconsistent or more in conflict than that which is permitted under the scheme of marking regulation under the Federal Toy Gun Law is prohibited by the Code. Additionally, each of the following methods of marking or coloration permissible under at 15 CFR Part 1150.3 conflict with the requirements of the Code on its face:

1. The Code requires that the barrel of such guns "be closed with the same material of which the gun is made for a distance of *not less than* 1/2" from the front of said barrel." (emphasis supplied) On the other hand, the Federal Toy Gun Law expressly provides for a blaze orange plug, or band marking on the barrel of the toy, recessed no more than 6 millimeters from the muzzle end of such barrel (15 U.S.C. Sect. 5001(b)(2)). What could be more inconsistent than the requirements of the Code when juxtaposed with the requirements of the Federal law!, i.e., if a plastic blaze orange plug is inserted in a metal toy gun, it would be violative of the Code on its face, since it is not made of the

"same material". Also, "the depth of ½"" conflicts with the 6 millimeter requirement of the Federal Toy Gun Law.

2. In addition, the Federal Toy Gun Law allows for a "blaze orange band" around the perimeter of the gun barrel on functional water or light-emitting guns in lieu of plugging the barrel in its entirety, while the City Code requirement requires the barrel to be completely plugged.

3. A black, blue, silver or aluminum toy gun with the federally designated blaze orange plug or marking, permitted under Federal regulations violates the Code.

4. A bright blue toy gun permitted under the Federal regulations violates the code prohibition of use of the color blue.[1]

5. A toy gun whose entire exterior surface is in the following colors, with or without a blaze orange plug or marking:

white	bright red	bright orange
bright yellow	bright green	bright blue
bright pink	bright purple	

either singly or as the predominant color in combination with other colors in any pattern violate the Code, if it contains the colors blue, black, aluminum or silver.

(App. 44a-46a)

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[1] Interestingly, one of the toy guns the City alleges was sold by the other defendants not only contained the required blaze orange plug under 15 U.S.C. § 5001(b)(2), but also was colored bright blue in accordance with the alternate colorations specified in the U.S. Department of Commerce's toy gun regulations. (15 CFR 1150.3(d))

2. The Proceeding in the N.Y. Supreme Court

The original action was commenced on December 16, 1993 by the City seeking an injunction enjoining retailers and manufacturers from selling, distributing or possessing imitation or toy guns in the City of New York in violation of the Code.

JA-RU was served with the Order to Show Cause, Summons and Complaint by fax after the N.Y. Supreme Court - ordered time for service on December 16, 1993 by 5:00 p.m. On less than one hour's notice, counsel for JA-RU appeared on its behalf. Service of the Order to Show Cause was consented to solely for the purpose of contesting the issuance of a preliminary injunction. At such time, the N.Y. Supreme Court denied plaintiff's injunctive relief after counsel for JA-RU raised the previously undisclosed issue of preemption under the Federal Toy Gun Law.

The City requested the N.Y. Supreme Court to reconsider its decision based on the submission of further pleadings. JA-RU opposed any entry of any injunction against it under the Code, since there is no jurisdiction and the City's attempt to enforce the Code is preempted by Federal law.

On or about April 12, 1994, the N.Y. Supreme Court issued a preliminary injunction against JA-RU. The N.Y. Supreme Court held that the Code which, *inter alia*, governs the sale, possession, manufacturing, distributing and transporting of toys or imitation pistols or revolvers, did not conflict with the Federal Toy Gun Law and that Congress, by enacting 15 U.S.C. § 5001 and the regulations promulgated thereunder by the United States Secretary of Commerce, did not intend to preempt the field of marking of toy or imitation firearms. Petitioner, JA-RU, argued that (1) the Federal Toy Gun Law and Code contained explicit inconsistencies, and (2) a plain reading of the exemption provision of 15 U.S.C. § 5001 makes it clear that Congress intended to expressly preempt all state and local laws which require markings on toy guns that are different from those required by the Federal Toy Gun Law.

Conversely, the N.Y. Supreme Court further found that the word "inconsistent" in the preemption clause meant "possessing an inability to simultaneously comply with both regulations" (See App. 25a) as opposed to JA-RU's interpretation that "inconsistent" was intended by Congress to mean "different or incompatible". The N.Y. Supreme Court concluded that compliance with both the Federal Toy Gun Law and Code was not impossible.

JA-RU contended that the N.Y. Supreme Court's decision was erroneous as a matter of law and that the preemption analysis was flawed. Furthermore, JA-RU argued that the N.Y. Supreme Court decision erroneously applied a strained, myopic analysis of the Federal Toy Gun Law in relation to the Code.

By relying so heavily on *Florida Lime and Avocado Growers, Inc., et al., supra*, to support its position, the N.Y. Supreme Court has misconstrued the standard of law applicable to the Federal Toy Gun Law. *Florida Lime and Avocado Growers, Inc. et al., supra* is a case that involved an "implied" preemption claim under marketing orders issued by the Secretary of Agriculture under the Agricultural Adjustment Act ("AAA"). In that case, that Court searched in vain for an unambiguous Congressional mandate evidencing Congressional intent that such marketing orders should displace state regulation. The language of that Act contained only vague reference to a general policy of minimum federal standards and did not evidence an intent to preempt state regulation. *Id.* at 1220-1222. After finding that the AAA did not contain a design to displace state regulation because orders issued by the Secretary under the Act were not "regulations", were meant to be regional and not national in scope and because the legislative history did not require national uniformity, this Court concluded that the statute simply did not create a preemptive national scheme of regulation.

However, the Federal Toy Gun Law bears little resemblance to the AAA. The Federal Toy Gun Law, as noted herein with specificity, contains an express preemption provision and evidences a preemptive design simply not evident in the AAA (compare *Florida Lime and Avocado Growers, supra* with *Campbell v. Hussey*, 368 U.S. 297, 82 S.Ct. 325 (1962), wherein the Federal Tobacco Inspection Act was found to contain a preemptive design).

This Court in *Cipollone v. Liggett Group, Inc., supra* having found an express preemption provision under Section 5(b) of the Public Health Cigarette Smoking Act of 1969, determined that it applied to preempt state common law tort claims based upon a failure to provide consumer warnings beyond that which was required by the Federal law. In reaching its determination, this Court noted:

> "We must give effect to this plain language unless there is a good reason to believe that Congress intended the language to have some more restrictive meaning." (citing *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 97, 103 S.Ct. 2890, 2900 (1983)); *Cipollone, supra*, 112 S.Ct. 2608 at 2620.

The New York Courts failed to follow this approach or to adequately consider that the local law would undermine the Federal scheme of regulation.

3. The Decision of the Appellate Division

On March 14, 1995, the Appellate Division affirmed the decision of the N.Y. Supreme Court. However, the decision was not unanimous. Two (2) out the five (5) Justices strenuously dissented. The dissenting Justices of the Appellate Division, recognizing the flawed analysis of the N.Y. Supreme Court, found that:

> "the intent of Congress to supersede local legislation regulating the appearance of toy guns is apparent from

> the face of the statute. In attempt to limit the scope of preemption, Supreme Court relies on cases dealing with implicit, not express, preemption that are inapposite under the circumstances presented by this matter (*see, Cipollone v. Liggett Group*, 505 U.S. 504, 112 S. Ct. 2608; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 858)." (See App. 16a).

Also, the dissent noted:

> In construing the intent of Congress, Supreme Court misapprehends the language of the preemption provision. By limiting the local ordinances superseded to those that 'provide for markings or identification inconsistent with provisions of this section', the statute does not render preemption of local measures that purport to regulate the *appearance* of a toy gun less than absolute. The limitation merely gives the locality the latitude to regulate *other* aspects of the sale of toy guns, and their sale could presumably be banned altogether. However, the locality is absolutely precluded from enforcing regulations, such as those contained in the Administrative Code provision, that bear on such aspects of the toy's design as its color, its markings or the specifications of the muzzle plug. It was an abuse of discretion to grant plaintiff's motion for a preliminary injunction. (App. 17a)

4. The Opinion of the Court of Appeals

On May 7, 1996, the Court of Appeals, affirming the order of the Appellate Division, answering the certified question "Was the order of Supreme Court, as affirmed by this Court, properly made?", and concluded that Congress has not "expressly or impliedly preempted local regulation of the markings on toy guns and that the conditions set forth in the Administrative Code § 10-131(g) are not incompatible or inconsistent with those provided in the Federal Toy Gun Law in that compliance with both is not impossible". (See App. 2a)

Acknowledging the inherent police power of the states, (App. 4a), the Court of Appeals first reviewed the specific preemption language set forth by Congress in the Federal Toy Gun Law to ascertain whether Congress has preempted all State and local regulation of toy guns pursuant to 15 U.S.C. 5001(g). The Court of Appeals correctly found that the Federal Toy Gun Law's preemption clause expressly preempted state regulation of replicas of antique collector firearms, B-B guns, paint ball guns, or pellet-firing air guns under 15 U.S.C. § 5001(g), which bars any state from prohibiting the sale of such devices, and with respect to antique replicas of pre-1898 firearms, the manufacture of such device (See, 15 U.S.C. § 5001(g)(i) and (ii); *Coalition of New Jersey Sportsmen v. Florio*, 744 F. Supp. 602, 608-609 (D.N.J. 1990)) but erroneously concluded that this was *solely* the extent of preemption intended. The Court of Appeals did not view the sweep of the Federal Toy Gun Law's preemption clause as far-reaching as JA-RU claims (See App. 5a). Congress did not, according to the Court of Appeals' interpretation, "intend to supersede all local regulation of markings on toy guns and dominate the field." (See App. 6a).

The Court of Appeals, supported its finding that the scope of the preemption clause is limited, and not far reaching, by referring to comments by Senator Robert Dole, the legislation's sponsor which in the Court of Appeals' opinion confirmed that Congress did not intend the Federal Toy Gun Law to preempt all state and local measures involving marking of toy guns. However, the Court of Appeals never compared the state statutes referenced to actually determine if their marking requirements were the same as the Federal requirements.

The Court of Appeals, while stating: "inconsistency has been found where local laws prohibit what would have been permissible under state law or impose pre-requisite additional restrictions on rights under state law, so as to inhibit the operation of the states' general laws" (App. 7a), refused to apply

such a standard to review the conflict between the Code and the Federal Toy Gun Law.

The Court of Appeals erroneously determined that Congress did not intend to dominate the field regarding the regulation of *markings* of toy and imitation firearms (App. 8a). The Court of Appeals opined that (1) the Code did not conflict with the conditions enumerated in the Federal Toy Gun Law, (2) it was not impossible to comply with both the Federal and local laws and that (3) co-existence of Federal and local laws regarding the marking of toy and imitation firearms was, in fact, intended by Congress and therefore "did not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress". (App. 8a).

The Court of Appeals rejected the argument of the dissent of the Appellate Division decision that Congress had clearly elected to have a uniform federally dominant scheme of marking for toy guns, which precluded local demarcation requirements which are not compatible with the federal scheme of regulation (App. 17a-18a).

The Court of Appeals also misinterpreted this Court's ruling in *Cipollone v. Liggett Group, Inc.*, *supra* to exclude the possibility of the existence of implied preemption. This interpretation precluded the Court of Appeals from accurately examining Congress' intent. The express provisions of the statute, the regulations promulgated by the United States Department of Commerce, which sets forth a comprehensive scheme of marking and coloration of toy guns, and the Congressional Record pertaining to the adoption of 15 U.S.C. § 5001, clearly establish the existence of a comprehensive Federal scheme of markings for toy guns. Consequently, it is clear that Congress intended to preempt inconsistent local requirements also directed at the markings of such toys.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision has completely frustrated and undermined the federal scheme of regulation governing the marking of toy and imitation firearms. Moreover, the ruling opens the door for chaos resulting from conflicting state and local law schemes for marking of toys and imitation firearms. The N.Y. Courts myopically relied on decisions of this Court involving implied preemption (specifically, *Florida Lime and Avocado Growers, Inc., et al., supra*) despite the clear express preemption provision in the Federal law. Furthermore, the N.Y. Courts misapplied the decisions of this Court in *Cipollone v. Liggett Group, Inc., supra* and *Hines v. Davidowitz, supra* as explained in this Court's recent decisions, *Freightliner Corporation v. Myrick, supra* and *Medtronic v. Lohr, supra*).

The Court of Appeals adopted an extraordinarily narrow interpretation of the Federal Toy Gun Law preemption provisions concluding preemption did not exist, finding no actual conflict between the two schemes of regulation (See App. 7a-8a).

The Court of Appeals concluded that the additional conditions imposed by the Code do not conflict with the conditions set forth in the Federal Toy Gun Law and therefore compliance with both is not impossible. If the City Code is held not to be preempted by the Federal Toy Gun Law, it is virtually certain that a uniform scheme of national regulation of markings of toy guns will be supplanted by a multitude of state laws or local ordinances with restrictions of various colors and designs of their choosing. This would result in impeding the manufacturer and sale of toy guns in interstate commerce.

The Court of Appeals has misinterpreted the Court's ruling in *Cipollone v. Liggett Group, Inc., supra* to exclude the possibility of the existence of implied preemption. This

interpretation precluded the Court of Appeals from fully examining Congress' intent which was to establish a comprehensive scheme of marking and coloration of toy guns. The record clearly shows the existence of a comprehensive national scheme of marking requirements. Consequently, the provisions of the Code "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra.* While the Court of Appeals found that express preemption provisions exist, they limited them to the point where they are undermined. In this case, the Court's care and wisdom is needed to enforce the principle of federal preemption. Only by this means can a uniform scheme of regulation be maintained consistent with the intent of Congress.

I. THE COURT OF APPEALS HAS IGNORED AND MISCONSTRUED THE INTENT OF CONGRESS TO EXPRESSLY PREEMPT STATE AND LOCAL LEGISLATION REGULATING TOY AND IMITATION FIREARMS

A. Preemption Doctrine

The preemption doctrine has been the subject of much recent attention by the Supreme Court. The standard of law has been consistently interpreted. See *Cipollone v. Liggett Group, Inc., supra* at 2617; *Morales v. Trans World Airlines, Inc.*, 504 U.S. ___, 112 S.Ct. 2031, 2036-2037 (1992); *American Airlines, Inc. v. Wolens*, 115 S.Ct. 817 (1995) (invoking express preemption); *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 112 S.Ct. 2374, 2383 (1992) (invoking implied preemption); *Medtronic, Inc. v. Lohr, supra*; *Freightliner Corp. v. Myrick, supra.*

The Supremacy Clause of the Constitution clearly provides that the laws of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution of laws of any state to the contrary notwithstanding" U.S. Constitution, Art. VI, cl. 2. It is

well settled that state law that conflicts with federal law is "without effect". *Cipollone v. Liggett Group, Inc., supra*, citing *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128 (1981). Since *McCulloch v. Maryland*, 17 U.S. 316, 427, 4 L.Ed. 579 (1819), the Supreme Court has held that state law which conflicts with federal law is preempted. Traditionally, a three-prong judicial inquiry is involved: first, a court must assess the comprehensive nature of the federal regulatory scheme; second, a court must determine whether there is a dominant federal interest involved in the regulations; and, third, a court must analyze the threat of conflict between state and local laws and the effective administration of the federal program. *Pennsylvania v. Nelson*, 350 U.S. 497 at 502-6, 76 S.Ct. 477 at 48-82, 100 L.Ed. 640 (1956).

In performing the preemption analysis the Court starts with the assumption that the historic police powers of states are not to be superseded by federal acts unless that is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). Furthermore, in order for preemption to apply in the area of a state's police powers, Congress, or the agency charged with administering a statute, must make its intent to preempt "clear and manifest" *Hillsborough County v. Automated Medical Labs, Inc.*, 471 U.S. 707, 718, 105 S.Ct. 2371, 85 L.Ed. 714 (1985); *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615, 622 (2d Cir. 1992). However, Congress under the Commerce Clause may displace state power (*Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at 234-36, 675 (S.Ct. at 1154-55), or Congress, by its silence, may indicate a purpose to let state regulation be imposed on the federal regime. *Florida Avocado Growers, Inc., et al. v. Paul, supra* at 141-143; *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103-04, 84 S.Ct. 219, 222 (1963); *Pennsylvania v. Nelson, supra*. The question of whether the Code is preempted by the Federal Toy Gun Law is one of Congressional intent. "The purpose of Congress is the ultimate touchstone." *Allis-*

Chalmers Corp. v. Lueck, 471 U.S. 202, 208, 105 S.Ct. 1904 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1189 (1978)); *Retail Clerks Int'l Ass'n v. Schermerhorn*, *supra*; see also *FMC Corp. v. Holliday*, 498 U.S. 403, 111 S.Ct. 403, 407 (1990).

Preemption may be either express in the statute or implied by its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 98 S.Ct. 1305, 1309 (1977); *Shaw v. Delta Airlines, Inc.*, *supra* at 95, 103; *Fidelity Federal Savings & Loan Assn v. De la Questa*, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3020 (1982). Furthermore, an express preemption provision does not preclude the possibility of implied preemption. *Freightliner Corp. v. Myrick*, *supra*. Two types of implied preemption are recognized: field preemption, where the scheme of federal regulation is "so prevasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Fidelity Federal Savings & Loan Assn v. De La Questa*, *supra* at 153 quoting *Rice v. Santa Fe Elevator Corp.*, *supra* at 230, and conflict preemption, where the state law is preempted if that law actually conflicts with federal law (see *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203, 103 S.Ct. 1713, 1722 (1983)) or where compliance with both federal and state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, *supra*; *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302 (1988); *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704 (1971).

B. Application of Express Preemption Doctrine

The analysis utilized by the Court of Appeals in reviewing the express preemption provision in the Federal Toy Gun Law and determining congressional intent is faulty and departs dramatically from the Court's guidance in this area. In the Court's recent decision, *Medtronic, Inc.v. Lohr*, *supra* the Court, as in *Cipollone v. Liggett Group, Inc.*, *supra* was

required to interpret a statutory provision that expressly pre-empts state law. The Court noted that:

> "although our analysis of the scope of the pre-emption statute must begin with its text (see *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111, 112 S.Ct. 2374 (1992)) our interpretation of that language does not occur in a contextual vacuum. Rather the interpretation is informed by two presumptions about the nature of pre-emption. First, . . . we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress, Id. at 230, 67 S.Ct. at 1152; *Hillsborough Cty*, 471 U.S. at 715-76, 105 S.Ct., at 2376; cf. *Fort Halifax Packing Co.v. Coyne*, 482 U.S. 1, 22, 107 S.Ct. 2211, 2223, 96 L.Ed. 2d 1 (1987). . . Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963), that the purpose of Congress is the ultimate touchstone in every pre-emption case. See e.g. *Cipollone*, 505 U.S. at 516, 112 S.Ct. at 2617; *Gade*, 505 U.S. at 96, 112 S.Ct., at 2381, 2382; *Malone v. White Mater Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978). As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of congressional purpose *Cipollone*, 505 U.S. at 530, n. 27, 112 S.Ct., at 2624, n.27. Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. *Gade*, 505 U.S., at 111, 112 S.Ct. at 2390. . . Also relevant, however, is the structure and purpose of the statute as a whole, *id.* at 98, 112 S.Ct., at 2383. . . , as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its

surrounding regulatory scheme to affect business, consumers and the law" *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2239 (1996).

In the Court of Appeals' view, the Code is not preempted because it is restrictive but not prescriptive. This is to say they find a distinction between restricted use of color as opposed to the prescriptive use of color to mark toy guns. However, this analysis is too myopic. First, a restriction could have as much a substantive impact as a prescription. Both can result in inconsistent standards of coloration for toy guns. Second, such reasoning ignores the specific instances of incompatibility between the Code and the Federal Toy Gun Law which we have previously enumerated. While we agree the Federal Toy Gun Law does not act as an absolute bar to state and local regulation via supplementary enforcement, it does supersede state and local schemes of regulation which have incompatible schemes of coloration or demarcation of toy guns.

A plain reading of 15 U.S.C. § 5001 makes it clear that Congress meant to expressly preempt all state and local laws inconsistent with the Federal Law. Under the facts of the instant case, application of the Code is inconsistent with the Federal Law.

As we have noted, the appropriate analysis of preemption thus requires the Court to ascertain Congress' intent in enacting the federal statue at issue. "The purpose of Congress is the ultimate touchstone." *Allis-Chalmers Corp. v. Lueck*, *supra* at 208. The Court must "consider the plain language of an express preemption provision as the most salient factor." (*Shaw v. Delta Air Lines, Inc.*, *supra* at 2900; *Morales v. Trans World Airlines, Inc.*, *supra* at 2036).

In the instant case, 15 U.S.C. § 5001 preempts the Code since the Code requires markings on toy guns that are "inconsistent" with those required by the Federal law. The heading

of 15 U.S.C. § 5001(g) is clear and specific. It provides as follows: "(g) *PREEMPTION OF STATE OR LOCAL ORDINANCES; EXCEPTIONS*". While many statutes do not have specifically titled preemption provisions or even use the word "preemption", this particular statute is quite express. The Section title alone makes it clear that Congress intended to supersede state or local laws or ordinances. This is further evidenced by the wording of the preemption provision, which states: "The provisions of this section shall supersede any provisions of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section. . .". Congress was clear that they intended the markings and scheme of identification provided for in the statute (15 U.S.C. § 5001) and in the supplementary regulations issued by the Secretary of Commerce to be paramount and that no state or local authority should be able to provide for a different scheme of markings (whether by restrictive or prescriptive color, symbol, design or otherwise).

The plain reading of the statute's wording contradicts the N.Y. Court's strained interpretation of the word "inconsistent" as it is used in the Federal statute. Webster's Universal Unabridged Dictionary defines "inconsistent" as follows: ". . . lacking agreement in kind, nature, form, etc.; not in harmony or accord; incompatible; not uniform; not holding together; self-contradictory; not holding to the same principles or practice". Therefore, a plain reading of the language of preemption does not support the N.Y. Court's myopic view. It is irrelevant that it might be possible to comply with both standards, if the standards are inconsistent as defined above.

This is also very clear from the Congressional Record evidencing the adoption of the Federal statute. For example, both Representative Moorehead and Senator Robert Dole, in recognizing the need for a comprehensive scheme of federal regulation of markings on toys guns, stated:

> "Unfortunately, as I have previously noted, recently a few states and local jurisdictions have enacted laws or ordinances with inconsistent or conflicting provisions. Some have banned the sale of a few items altogether, while others have required different methods of marking."

They further clarified the need for strong preemption by stating:

> "Any State or local laws or ordinances which provide for inconsistent or conflicting marking or identification shall be preempted and superseded. For example, a local ordinance banning sale of traditional B-B, paint ball or pellet-firing air guns would be of no force and effect. *Also, if there were a State law that required a green colored plug or a red stripe on the side. It too would be nullified.* (emphasis supplied)

Congressional Record-Senate, S15534-15535 and *Congressional Record-House*, H10073.

Additionally, the enabling regulations established by the Department of Commerce at 15 C.F.R. § 1150 et seq. provide a strong indicia of Congressional intent to occupy the field of regulation of the markings of toy and imitation firearms. As we have noted, 15 C.F.R. § 1150.3 provides an expansive scheme of marking these products. These markings include a blaze orange solid plug permanently affixed to the muzzle of the barrel and recessed no more than 6 millimeters from the muzzle end of the barrel, a blaze orange coloration of the exterior surface of the barrel to the depth of 6 millimeters, the use of transparent or translucent materials for the construction of the gun, or the coloration of the entire exterior surface of the gun in white, bright red, bright orange, bright yellow, bright blue, bright green, bright pink or bright purple, either singly or as the predominant color in combination with other colors in any pattern. These regulations were carefully con-

sidered before adoption by the Department of Commerce (See App. 34a-56a). Additionally, 15 C.F.R. § 1150.1 makes it clear that the regulations are intended to apply "to toy, look-alike and imitation firearms having the appearance, shape and/or configuration of a firearm and produced or manufactured or entered in commerce on or after May 5, 1989. . .". 15 C.F.R. § 1150.5 (entitled "Preemption") carries through the Congressional intent expressly evidenced by the statute's language to supersede any provision of State or local law or ordinance which provides for markings or identification which differ from the federal statute or these regulations.

The Court is clear that the Department of Commerce regulations are afforded great deference in statutory interpretation *Cf. Helvering v. Winmill*, 305 U.S. 79, 59 S.Ct. 45, 83 L.Ed. 52 (1938); *Coalition of New Jersey Sportsmen v. Florio*, *supra* at 607. However, the Court of Appeals ignores the comprehensive coloration requirements administered by the Department of Commerce.

While we believe the Federal Toy Gun Law does not prevent state and local regulations which regulate other aspects of toy guns not covered by the Federal Toy Gun Law, such as sale, packaging or display, the law does supersede state and local schemes of regulation which have different directives regarding the appearance of toy guns.

When taken as whole, the clear and manifest intent of Congress as demonstrated by the construction of the State itself and the implementing regulations dictates that the Code provisions are incompatible with the requirements under the Federal Law and are superseded thereby. It is difficult to imagine a more specific expression of Congressional intent to supersede local regulation of coloration of toy guns than is evident here.

II. ASSUMING ARGUENDO THAT THE EXPRESS PREEMPTION PROVISION IS LIMITED, THE FEDERAL TOY GUN LAW IMPLIEDLY PREEMPTS THE CODE

Even assuming arguendo that the Court of Appeals was correct in finding that Congress has not expressed an intent to supersede all state or local regulation in the field of marking of toy or imitation firearms, the Court of Appeals still erred in finding that the Federal law did not preempt the Code.

The Court of Appeals' decision ignored this Court's analysis in *Freightliner Corp. v. Myrick, supra*. The Court in *Myrick* further explained its holding in *Cipollone v. Liggett Group, Inc., supra* specifically with regard to how a Court is to review an express preemption provision. The Court stated "the fact that an express definition of the preemptive reach of a statute 'implies'—i.e. supports a reasonable inference that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibly of implied pre-emption" *Freightliner Corp. v. Myrick, supra.*

The Court of Appeals, upon determining the limited application of the preemption provision, ceased its analysis in contradiction to this Court's holding in *Cipollone* further clarified in *Freightliner v. Myrick Corp.* which required the Court of Appeals to evaluate the Federal Toy Gun Law for the presence of implied preemption. The Court of Appeals did not consider whether there existed implied conflict pre-emption where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra.*

Clearly, the Federal law and enabling regulations were intended by Congress to offer a uniform marking system for toy guns nationwide to safeguard the public and provide means for distinguishing toy or imitation firearms from real firearms and to prevent individual states from enacting different marking requirements which would ultimately hinder

the manufacture and sale of toy guns in interstate commerce. In *Myrick* the Court found no preemption of state common law design defect claims since there was no Federal standard to comply with. Conversely, in this case, there exists a comprehensive scheme of marking requirements which, through the express preemptive language, the enabling regulations and legislative history was intended to preclude state laws or local ordinances which impose marking requirements for toy guns.

Furthermore, the Court of Appeals ignores its own analysis of "preemptive intent"as set forth in *Vatore v. Commn. of Consumer Affairs of the City of New York, et al.*, 83 N.Y.2d 645, 612 N.Y.S.2d at 357 (1994) and *New York State Club Assn., Inc.v. City of New York*, 69 N.Y.2d 211, 513 N.Y.S.2d 349 (1987). According to the Court of Appeals in *Vatore v. Commn. of Consumer Affairs*, in the absence on any general preemptive intent, "preemptive intent may be inferred from the nature of the subject matter being regulated and the purpose and scope of the state legislative scheme", *Vatore v. Commn. of Consumer Affairs, supra*. Clearly, preemptive intent is apparent from the comprehensive scheme of marking of toy and imitation firearms set forth in the Federal Toy Gun Law. Consequently, the Federal Toy Gun Law is "the supreme law of the land" (U.S. Const., Art V1, c1 2) and the conflicting Code is therefore "without effect", *Cipollone v. Liggett Group, supra* at 2617.

CONCLUSION

For the foregoing reasons, the Petition for a Writ *certiorari* should be granted here.

Respectfully submitted,

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